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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-189931

DATE: October 18, 1977

MATTER OF: J. H. Rutter Rex Manufacturing Co., Inc.

DIGEST:

Since protest involves procurement pursuant to Arms Export Control Act (formerly Foreign Military Sales Act) and will not involve use of appropriated funds, matter is not subject to settlement by General Accounting Office and is dismissed.

J. H. Rutter Rex Manufacturing Co., Inc. (Rutter Rex) protests the inclusion of small business set-aside and small business labor surplus area set-aside restrictions in invitation for bids No. DSA100-77-B-0953, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center, Philadelphia, Pennsylvania, on July 21, 1977 for 748,220 pairs of summer uniform work trousers.

By letter dated September 15, 1977, DLA informed this Office that the solicitation represents part of a sale of defense articles to a foreign country under the authority of the Arms Export Control Act, 22 U.S.C. 2751 et seq., formerly known as the Foreign Military Sales Act (see section 201(a) of the International Security Assistance and Arms Export Control Act, Pub. L. No. 94-329, 90 Stat. 729 (1976)). The agreement between the United States and the foreign government is denominated a "dependable undertaking" pursuant to 22 U.S.C. 2762(a) (Supp. V 1975) and obligates the foreign government to make funds available in such amounts and at such times as may be required to meet the payments called for by the contract. DLA recommends that the protest be dismissed on the basis of our decisions in Gibraltar Industries, Inc., B-187635, January 21, 1977, 77-1 CPD 43 and Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD 60, in which we declined to consider protests concerning foreign military sales procurements pursuant to 22 U.S.C. 2762 because they did not involve expenditures of appropriated funds.

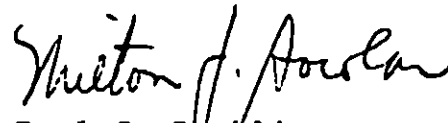
B-189901

Rutter Rex, on the other hand, asserts that we should review the matter because appropriated funds of the United States will be involved if the foreign government defaults on its obligation to furnish funds to the United States in order to meet contractual commitments and because there must be a review of the agency's actions since the agency is not free to act in any way that it sees fit regardless of the consequences.

We agree with DLA that the protest should be dismissed. The record clearly indicates that the procurement involves a foreign military sales agreement pursuant to which the foreign government is obligated to make periodic payments in accordance with the payment schedule of the agreement. While there is always the possibility of a default on the payment obligation, we do not believe that changes the essential character of the transaction as one to be financed by a foreign country rather than by appropriated funds of the United States. See Verne Corporation, B-198332, June 2, 1977, 77-1 CPD 386. In any event, here we are advised by DLA that all payments by the foreign country have been made on schedule, and that only the final payment, due in December 1977, remains unpaid.

With regard to the other point made by Rutter Rex, we point out that we do not render decisions in procurements involving foreign military sales because there will not be any permanent expenditure of appropriated funds. Although this means the bid protest review procedures of 4 C.F.R. Part 20 (1977) are not available to would-be protesters, review of the procurement actions involved may be available through agency protest procedures and in any event may be obtained through the courts.

The protest is dismissed.

for 
Paul G. Dumbly
General Counsel